Ooi Bee Tat @ Ooi Bee Lee v Ooi Bee Tat & Sons Sdn Bhd & Anor

HIGH COURT (PULAU PINANG) — ORIGINATING SUMMONS NO 24–899 OF 1997
JEFFREY TAN J
14 NOVEMBER 1998

Civil Procedure *— Res judicata — Issue estoppel — Issues raised on sale agreement and assignment should have been canvassed in appeal before Federal Court — Recanvassing of same issues was an abuse of process of court — Whether plaintiff could prove exception that order from High Court of concurrent jurisdiction was null and void*

Civil Procedure *— Striking out — Action — Appeal struck out by Federal Court — Same reliefs sought in this action — No reasonable cause of action disclosed — Whether court was functus officio to hear action — Whether issues were res judicata — Rules of the High Court 1980 O 18 r 19 & O 92*

An action (Suit No 449–81) was filed against OBT (the plaintiff) for breach of a sale agreement by TAC & Sons (the second defendant). In that action, OBT counterclaimed against TAC & Sons for specific performance of the sale agreement, whilst OBT & Sons (the first defendant), who intervened as the second defendant, counterclaimed against TAC & Sons for specific performance of the same sale agreement. At the trial, the High Court dismissed both TAC & Sons' claim and OBT's counterclaim against TAC & Sons, and ordered TAC & Sons to specifically perform the sale agreement and permit OBT & Sons, as successor-in-title/assignee of OBT, to carry out the sale agreement. An injunction sought by OBT & Sons was granted and TAC & Sons was ordered to pay damages and interest to OBT & Sons. Subsequently, TAC & Sons and OBT lodged their appeals which were then struck out by the Federal Court.

The plaintiff in this action sought to undo the final result in Suit No 449–81; and to review, reverse, alter or change the judgment that is final and binding on all parties and that was not open to appeal. On the other hand, the first defendant applied under O 18 r 19 of the Rules of the High Court 1980 ('the RHC'), the inherent jurisdiction of the court and O 92 of the RHC to strike out this action, on the grounds that: (i) the plaintiff had not disclosed a reasonable cause of action against the first defendant; (ii) the action was frivolous, vexatious and an abuse of the process of court; (iii) the court had no jurisdiction, because it was functus officio, to hear the instant action; and (iv) the issue in this action was res judicata as the reliefs sought by the plaintiff had been exhaustively dealt with in Suit No 449–81.

Held, allowing the first defendant's application:

(1) One High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. Only a person affected by an order which could be proved to be null and

void on ground of irregularity or lack of jurisdiction is entitled to apply to have the order set aside as of right without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity. The general rule is that the order must be a nullity. Here, since the plaintiff adopted the appeal procedure, then the plaintiff should abide by the result. Having failed in his appeal, OBT could not fall back and launch a collateral attack against the judgment nor reagitate the same issues that ought to have been canvassed before the appellate court, or there would be no end to litigation (see pp 24F–H and 25E–F).

(2) This action was an attempt to reopen an order which was final and binding, and this amounted to an abuse of the process of the court. Even if there was no appeal that exhausted the right to this action, the plaintiff still could not bring himself within the exception, ie to prove the final judgment of a High Court of concurrent jurisdiction is null and void on grounds of irregularity or lack of jurisdiction. The principles of action or issue estoppel operated as a complete bar to the present action and prevented the plaintiff from relitigating the issues that he was trying to bring up under the present action. Issue estoppel also prevented the plaintiff's contradiction of the correctness of the final judgment in Suit No 449–81 in this subsequent action and the plaintiff's dispute of an issue 'that had already been determined either expressly or by necessary implication'. Further, this court was truly functus officio (see p 27E–H).

[Bahasa Malaysia summary

Satu tindakan (Guaman No 449–81) telah difailkan terhadap OBT (plaintif), untuk kemungkiran perjanjian jual beli, oleh TAC & Sons (defendan kedua). Di dalam tindakan tersebut, OBT telah membuat tuntutan balas terhadap TAC & Sons untuk pelaksanaan spesifik bagi perjanjian jual beli tersebut, manakala OBT & Sons (defendan pertama), yang mencelah sebagai defendan kedua, membuat tuntutan balas terhadap TAC & Sons untuk pelaksanaan spesifik bagi perjanjian jual beli yang sama. Semasa perbicaraan, Mahkamah Tinggi telah menolak kedua-dua tuntutan TAC & Sons dan tuntutan balas OBT tehadap TAC & Sons dan memerintahkan TAC & Sons, untuk melaksanakan secara spesifik perjanjian jual beli tersebut dan membenarkan OBT & Sons, sebagai pengganti hakmilik/pemegang serahhak kepada OBT, untuk melaksanakan perjanjian jual beli tersebut. Injunksi yang dipohon oleh OBT & Sons telah diberikan dan TAC & Sons telah diperintahkan membayar ganti rugi dan faedah kepada OBT & Sons. Berikutan daripada itu, TAC & Sons dan OBT telah membuat rayuan yang kemudiannya telah ditolak oleh Mahkamah Persekutuan.

Plaintif di dalam kes ini cuba untuk mengubah keputusan akhir di dalam Guaman No 449–81; dan untuk mengkaji semula,

mengakaskan, mengubah atau menukar penghakiman yang muktamad dan mengikat kesemua pihak dan yang tidak boleh dibuat rayuan. Defendan pertama sebaliknya telah memohon di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), bidang kuasa sedia ada mahkamah dan A 92 KMT untuk membatalkan tindakan ini atas alasan-alasan: (i) plaintif telah tidak mendedahkan kausa tindakan yang munasabah terhadap defendan pertama; (ii) tindakan tersebut adalah remeh, menyusahkan dan menyalahgunakan proses mahkamah; (iii) mahkamah tidak mempunyai bidang kuasa kerana ia adalah functus officio untuk mendengar tindakan tersebut; dan (iv) isu di dalam tindakan tersebut adalah res judicata kerana relief-relief yang dipohon oleh plaintif telah dibicarakan secara menyeluruh di dalam Guaman No 449–81.

Diputuskan, membenarkan permohonan defendan pertama:

(1) Sebuah Mahkamah Tinggi tidak boleh mengetepikan satu perintah muktamad yang diperoleh mengikut aturan daripada sebuah Mahkamah Tinggi yang lain yang mempunyai bidang kuasa bersama. Hanya seseorang yang terjejas oleh perintah yang boleh dibuktikan sebagai batal dan tak sah atas dasar tidak mengikut aturan atau ketiadaan bidang kuasa, berhak untuk memohon supaya perintah tersebut diketepikan mengikut hak, tanpa ia perlu merujuk kepada kaedah-kaedah yang memperuntukkan dengan jelas prosiding-prosiding untuk mengetepikan perintah atas alasan tidak mengikut aturan. Prinsip umumnya adalah perintah tersebut hendaklah batal. Di sini, memandangkan plaintif telah menggunakan prosedur rayuan, plaintif haruslah menerima dan mematuhi keputusan tersebut. Setelah gagal di dalam rayuannya, plaintif tidak boleh melancarkan serangan kolateral terhadap penghakiman tersebut mahupun mendesak semula isu-isu yang sama yang seharusnya dikemukakan di mahkamah rayuan, atau tidak akan adanya kesudahan terhadap litigasi (lihat ms 24F–H dan 25E–F).

(2) Tindakan ini adalah percubaan untuk membuka semula satu perintah yang muktamad dan mengikat, dan ini adalah satu penyalahgunaan proses mahkamah. Walaupun jika tiada rayuan yang menghalang hak tindakan ini, plaintif masih lagi tidak termasuk di bawah kekecualian, iaitu untuk membuktikan penghakiman muktamad sebuah Mahkamah Tinggi yang mempunyai bidang kuasa bersama adalah batal dan tak sah atas dasar-dasar tidak mengikut aturan atau ketiadaan bidang kuasa. Prinsip-prinsip estopel tindakan atau isu beroperasi sebagai penghalang yang lengkap terhadap tindakan ini dan menghalang plaintif daripada melitigasi semula isu-isu yang ia cuba untuk membawa di bawah tindakan ini. Isu estopel juga menghalang penyangkalan plaintif terhadap ketepatan penghakiman muktamad di dalam Guaman No 449–81 di dalam tindakan ini dan pertikaian plaintif terhadap satu isu 'yang telah diputuskan

A sama ada secara nyata atau implikasi yang perlu'. Tambahan pula, mahkamah ini adalah functus officio (lihat ms 27E–H).]

Notes

B For cases on res judicata, issue estoppel, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4004–4010.

For a case on striking out an action, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 4335.

Cases referred to

C *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393 (refd)

Government of Malaysia v Dato' Chong Kok Lim [1973] 2 MLJ 74 D (refd)

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57 (refd)

Insas Bhd & Anor v Ayer Molek Rubber Co Bhd & Ors [1995] 2 MLJ 833 (refd)

Satyadhyan Ghosel & Ors v Sint Deorajin Dobi & Anor AIR 1960 E SC 941 (refd)

Stephenson v Garnett [1898] 1 QB 677 (refd)

Sun Life Assurance Co of Canada v Jervis [1944] 1 All ER 469 (refd)

Syarikat Perkhidmatan Bas Sibunga Sdn Bhd v Syakt Bas Jalan Leila Sdn Bhd [1997] 3 CLJ 614 (refd)

F *Tai Chai Yu v The Chief Registrar of the Federal Court* [1998] 2 CLJ 358 (refd)

Legislation referred to

Malay Reservation Enactment

G Rules of the High Court 1980 O 18 r 19, O 92

JA Yeoh (*Christina Siew* with him) (*Shearn Delamore & Co*) for the plaintiff.

Karin Lim (*Lim Hock Siang* with her) (*Presgrave & Matthews*) for the first defendant.

H *Loi Lay Hong* (*Cheah Teh & Su*) for the second defendant.

Jeffrey Tan J: This is the first defendant's application (encl 9) under O 18 r 19 of the Rules of the High Court 1980 ('the RHC'), the inherent jurisdiction of the court and O 92 of the RHC, to strike out the action on grounds that: (i) the plaintiff had not disclosed a reasonable cause of action I against the first defendant; (ii) the action is frivolous, vexatious and an abuse of the process of court; (iii) the court has no jurisdiction because it is functus officio to hear the instant action; and (iv) the issues in this action are res judicata.

The background facts, fairly straightforward, may be restated as follows. By an agreement dated 20 May 1977 ('the sale agreement'), one Tan Ah Chim @ Tan Ah Chin ('TAC') as the registered proprietor of land known as Holding 70 TS 5 NED Penang ('the said land') 'sold', whilst Ooi Bee Tat @ Ooi Bee Lee ('OBT' — the plaintiff herein) 'purchased' a portion of the said land measuring approximately 143,969sf, upon the terms and conditions set out in the sale agreement.

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However, that sale, in truth, was a joint venture between TAC as landowner and OBT as developer, as the true sale consideration — see cll 2 and 11 of the sale agreement — apart from a perfunctory cash deposit of RM10,000, was OBT's construction and completion, at OBT's costs, of three type 'A' houses (each costing RM120,000), 11 type 'B' houses (each costing RM330,000) and four type 'C' houses (each costing RM160,000) on the remaining 'unsold' portion of the said land. Perhaps further comment on the 'sale consideration' should be reserved for another day and on another occasion.

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About a year later, by an agreement dated 27 August 1978 ('the 27 August 1978 agreement'), TAC sold and Tan Ah Chin & Sons Sdn Bhd ('TAC & Sons' — the second defendant herein) purchased the whole of the said land, subject however to the 'rights, title and interest of OBT under the sale agreement', upon the terms and conditions set out in the 27 August 1978 agreement. The 27 August 1978 agreement provided that the sale consideration of RM790,000 shall be satisfied by the payment of RM40,000 and the allotment of 750,000 ordinary shares of RM1 each in the capital of TAC & Sons to TAC — see cll 2 and 3 of the 27 August 1978 agreement.

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A year later, by an assignment dated 14 June 1979 ('the assignment') and with the preamble stating it 'is supplemental to the sale agreement', OBT assigned all his 'rights, title and interest' in the sale agreement to Ooi Bee Tat & Sons Sdn Bhd ('OBT & Sons' — the first defendant herein) for the consideration and upon the terms and conditions set out in the assignment.

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It would appear, therefore, that by the middle of 1979, both parties to the sale agreement, be it with or without the consent of the other, had respectively sold and assigned their respective rights, title and interest in the sale agreement and had entrusted the performance and completion of the sale agreement to their respective successor-in-title or assignee. Anyway, in 1981, TAC & Sons filed an action (Penang High Court Suit No 449–81) against OBT for (alleged) breach of the sale agreement; OBT counterclaimed against TAC & Sons for specific performance of the sale agreement, whilst OBT & Sons, who intervened as the second defendant, counterclaimed against TAC & Sons for specific performance of the same sale agreement. So, quite apparently, OBT (plaintiff herein) and OBT & Sons, since both were after the same prize, had by then gone their separate ways.

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The pleadings in Suit No 449–81, eminently relevant to the instant application, particularly on the issues of functus officio and res judicata, should be, and so it is, set out in detail as follows.

A In its statement of claim, TAC & Sons averred that OBT who commenced construction of the buildings on the unsold portion of the said land on 22 August 1977 had: (i) failed to complete the said buildings within the stipulated period; (ii) used inferior building materials; and (iii) ceased, sometime in 1979, all building work altogether. TAC & Sons sought a declaration that it was entitled to rescind the sale agreement, general B damages for breach of the sale agreement and liquidated damages of RM10/ per day/per building from 22 February 1979.

Denying any breach of the sale agreement, OBT pleaded in his defence that the period for completion, since vacant possession of the said land was only obtained in September 1979, ran from September 1981. OBT denied C the use of any inferior building materials, disputed that TAC & Sons had suffered any loss or damage, averred that the cessation of building works in September 1979, was beyond his control and that rescission of the sale agreement, in the circumstances of the case, was not available to TAC & Sons.

D But soon, the spartan state of both statement of claim and defence would be considerably adorned, sparked probably by the inclusion of OBT & Sons on 9 October 1983 and on OBT & Sons' application as the second defendant in Suit No 449–81.

On or about 12 December 1983, pursuant to leave granted on E 5 October 1983, TAC & Sons filed an amended statement of claim. In that amended statement of claim, TAC & Sons amplified the alleged breach of the sale agreement and particularized the damage suffered by TAC & Sons. TAC & Sons also pleaded in the same amended pleading that: (i) OBT had allegedly assigned his title, rights and interest in the sale agreement to OBT & Sons; (ii) TAC & Sons was not a party to the assignment and that TAC F & Sons would not recognize the assignment; (iii) TAC & Sons would not deal with OBT & Sons as TAC & Sons had no confidence in OBT & Sons; and (iv) the sale agreement, if valid, had been terminated for the reasons stated in the amended statement of claim. TAC & Sons sought a declaration that the sale agreement had been rescinded, a declaration that OBT had no right to convey or transfer his rights, title and interest in the sale agreement G to OBT & Sons, and damages.

OBT pleaded in his amended defence, dated 18 February 1984, as follows. OBT commenced building works on 22 August 1977. TAC & Sons agreed to hand over vacant possession of the said land. When possession was obtained, there were eight squatters on the said land. Vacant possession H was obtained on 3 April 1981. Time ran from 3 April 1981. On 20 July 1982, in consideration of the sum of RM250,000, TAC & Sons discharged OBT's existing liabilities and extended the period for completion for another two years from 20 July 1982. OBT assigned the sale agreement to OBT & Sons. The assignment was rescinded on 13 February 1980 because of the total failure of consideration. The I assignment was null and void and of no effect. If that assignment was valid, TAC & Sons had no cause of action against OBT.

The intervener, OBT & Sons, pleaded in its defence and counterclaim dated 24 March 1984 as follows. TAC & Sons failed to deliver vacant

possession of the said land in accordance with the terms of the sale agreement. TAC & Sons was estopped, by its conduct, from relying on the sale agreement to rescind the sale agreement. TAC & Sons must prove the alleged use of inferior building materials. TAC & Sons was aware that OBT & Sons was carrying out the building works. OBT & Sons expended considerable sums towards the execution of the building works. TAC & Sons refused and restrained OBT & Sons from continuing with the building works. On 8 January 1979, OBT notified TAC & Sons that OBT's interest had accrued unto OBT & Sons. OBT & Sons assumed responsibility, on or about January 1979, for the execution of the building works. TAC & Sons, who was aware that OBT & Sons had assumed responsibility, did not raise any objection at the material time. TAC & Sons expressly and/or impliedly consented to OBT & Sons' execution of the building works. On 14 June 1979, OBT formally assigned his rights, title and interest in the sale agreement to OBT & Sons. On 1 October 1979, a copy of the assignment was extended to TAC & Sons. OBT's purported rescission of the assignment was frivolous and bad in law and could not defeat the rights, title and interest that accrued unto OBT & Sons. TAC & Sons wilfully refused to accept the assignment and prevented OBT & Sons from continuing with the building works. TAC & Sons was aware that OBT & Sons was a family company, that OBT was the managing director and that the building works would be carried out by OBT & Sons. OBT & Sons disputed the reliefs sought by TAC & Sons. OBT & Sons had expended the sum of RM440,772 towards the building works when TAC & Sons wrongfully prevented it from continuing with the building works. Despite OBT & Sons' requests, TAC & Sons refused to allow OBT & Sons to continue with the said building works. In so doing, TAC & Sons breached the sale agreement and thereby caused loss and damage to OBT & Sons. With regard to the relief, OBT & Sons sought an order for specific performance of the sale agreement, an order that TAC & Sons do allow OBT & Sons, as successor-in-title/assignee of OBT, to carry out the sale agreement and lastly, an injunction restraining TAC & Sons from interfering with OBT & Sons' execution of the building works.

In its reply and defence to counterclaim dated 2 April 1984, TAC & Sons pleaded that TAC & Sons had complied with the sale agreement, that TAC & Sons had not contracted with OBT & Sons who was refused entry to the building site, that TAC & Sons contracted with OBT, and that OBT & Sons must prove the sums allegedly expended towards the building works.

In its reply and defence to counterclaim dated 29 April 1986, TAC & Sons pleaded that the sale agreement had been rescinded and that the parties were precluded thereby from entering into any agreement extending the sale agreement. OBT must prove the alleged loss and damage.

Somehow, the pleadings would not end. Five years later, by a 'further amended defence and counterclaim' dated 20 June 1991, OBT appended the following pleadings. TAC & Sons had no cause to terminate the sale agreement. It was agreed, when the sale agreement was extended on 20 July 1982, that TAC & Sons would discontinue Suit No 449–81 and

would pass a resolution affirming the extension of the sale agreement; TAC & Sons failed to carry out both acts. OBT lost a potential profit of RM2,604,369. OBT sought: (i) a declaration that TAC & Sons had repudiated the sale agreement; (ii) a declaration that TAC & Sons had no reasonable cause to terminate the sale agreement in manner by filing Suit No 449–81 and that TAC & Sons by granting the extension had waived any breach of the sale agreement; (iii) a declaration that TAC & Sons had contravened the terms of the agreed extension, specific performance of the sale agreement and compensation for the delay occasioned by TAC & Sons' breach of the sale agreement; and (iv) lastly, alternatively, damages in the sum of RM2,604,369. On that, the pleadings came to a long overdue end.

Trial (of Suit No 449–81) before his Lordship, Edgar Joseph Jr J (as he then was), commenced on 7 May 1986 and ended on 28 August 1991. In the event, Edgar Joseph Jr SCJ (by then) dismissed both TAC & Sons' claim and OBT's counterclaim against TAC & Sons and ordered TAC & Sons to specifically perform the sale agreement and permit OBT & Sons, as successor-in-title/assignee of OBT, to carry out the sale agreement. His Lordship also granted the injunction sought by OBT & Sons and ordered TAC & Sons to pay damages and interest to OBT & Sons.

TAC & Sons and OBT lodged separate appeals to the former Supreme Court against the whole of the said judgment. On 17 May 1995, on OBT & Sons' motion, the Federal Court struck out TAC & Sons' appeal (No 02–489–92). Following that striking out, OBT & Sons applied on 4 January 1996 to strike out OBT's appeal (No 02–488–92). On 1 October 1996, the Federal Court, in allowing TAC & Sons' motion, struck out OBT's appeal.

Accordingly, if it needs, surely not, to be said, the subject of the litigation in Suit No 449–81 between TAC & Sons, OBT and OBT & Sons, since it reached and was disposed of by the apex court beyond there is no appeal, had reached a terminal end. The issues in Suit No 449–81 had run its entire course, the final outcome being, since the only appeals had been struck off, that the entire judgment of Edgar Joseph Jr J which includes, but of course, all findings of both fact and law, is final and binding on TAC & Sons, OBT and OBT & Sons, the litigants in Suit No 449–81 and this action.

In this proceedings, OBT is seeking the following reliefs:

(i) an order that that part of the grounds of judgment of the High Court dated 12 October 1992 in the matter under Penang High Court Civil Suit No 449 of 1981 ('the said grounds of judgment') in respect of the High Court's finding that the assignment agreement dated 14 June 1979 between the plaintiff and the first defendant ('the said assignment agreement') be expunged from the said grounds of judgment;

(ii) an order that that part of the said grounds of judgment on the consequential reliefs granted to the first defendant following the High Court's finding in respect of the said assignment agreement be expunged from the said grounds of judgment;

(iii) an order that that part of the judgment of the High Court dated 12 October 1992 in the matter under Penang High Court Civil Suit

No 449 of 1981 ('the said judgment') dismissing the second defendant's claim against the plaintiff with costs be affirmed; A

(iv) an order that that part of the said judgment ordering the second defendant to specifically perform the joint venture agreement dated 12 October 1977 be affirmed but in favour of the plaintiff and that that part of the said judgment permitting the first defendant as successors-in-title and/or assignee of the plaintiff thereunder to carry out their obligations and invoke their rights thereunder be set aside; B

(v) an order that that part of the said judgment restraining the second defendant by themselves, their members, servants or agents from preventing or interfering with the construction work or any part thereof be affirmed but in favour of the plaintiff and that the reference therein in favour of the first defendant be substituted accordingly; C

(vi) an order that that part of the said judgment allowing damages in the sum of RM5,764,134.64 and interest therein in the sum of RM5,432,183.63 and further interest on the total sum of RM11,196,318.27 at the rate of 8% pa thereon as from the date of judgment to date of payment in favour of the first defendant be set aside; D

(vii) an order that the senior assistant registrar of the High Court do assess damages in respect of the additional costs to complete the project under the joint venture agreement dated 20 May 1977 (ie the difference between the construction costs to complete the project pursuant to the order herein and the construction costs to complete the project in 1980) and of all damages suffered by the plaintiff in consequence of the delay occasioned by the second defendant's breach of the joint venture agreement dated 20 May 1977 and that all such damages as assessed be paid by the second defendants to the plaintiff; E

(viii) that that part of the said judgment providing for 18 months from the date of approval of the building plans by the relevant authorities or from the date when vacant possession of the sites concerned is given, whichever is the later, in order to complete the project pursuant to the joint venture agreement dated 20 May 1977, be affirmed but in favour of the plaintiff and that the reference therein in favour of the first defendant be substituted accordingly; F

(ix) that that part of the said judgment ordering that the second defendants pay the costs of the action be affirmed but in favour of the plaintiff and that the reference therein in favour of the first defendant be substituted accordingly; and G

(x) ... costs.

Put simply, tautology and semantics aside, OBT is seeking, in this proceedings: (i) to undo the final result in Suit No 449–81, for OBT & Sons would be denied, if OBT is successful, the fruits of the final result in Suit No 449–81; and (ii) to review, reverse, alter or change, or whatever, the judgment that is final and binding on TAC & Sons, OBT and OBT & Sons and that is not open to appeal. Indeed, Mr JA Yeoh for OBT admitted as much, for he said in his submission, that this proceedings, if allowed, would 'disturb' the judgment and would 'expunge' the grounds of judgment (the rest of Mr Yeoh's submission will be related in another part of this judgment). H I

Ms Karin Lim for OBT & Sons contended that the same reliefs now sought by OBT had been exhaustively dealt with in Suit No 449–81. OBT pleaded that the assignment had been rescinded and counterclaimed for a declaration that TAC & Sons had no right to rescind the sale agreement and for specific performance of the sale agreement. OBT & Sons pleaded that there was a valid sale agreement and a valid assignment. The trial court held that there was a valid assignment. OBT & Sons appealed to the former Supreme Court. Following the striking out of TAC & Sons' appeal, OBT & Sons applied to strike out OBT's appeal on three grounds:

> (a) that in view of the dismissal of [TAC & Sons'] appeal ... [OBT] should no longer be a party to the appeal [No 488-92] as there is no longer any lis before the Federal Court to allow the appeal to be proceeded with against [OBT & Sons];
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> (b) that as there is no counterclaim or cross claim made by [OBT] against [OBT & Sons] there is no independent cause of action against [OBT & Sons] and therefore [OBT & Sons] cannot continue as a party in view of the dismissal of the case of [TAC & Sons] against [OBT & Sons]; and
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> (c) that as a result of the dismissal of [TAC & Sons'] appeal ... the High Court order dated 12 October 1992 remains effective and that there cannot be another order to the contrary.

Ms Lim pointed out that OBT acknowledged, in his affidavit affirmed on 20 January 1996, the issues that OBT & Sons raised in its striking out application at the Federal Court. OBT responded that the dismissal of TAC & Sons's appeal did not estop him [OBT] from prosecuting his own appeal. OBT asked for certain reliefs (see encl 8 pp 112–114) from the Federal Court. The present reliefs (see encl 2, prayers iii–x) sought by OBT are identical to the reliefs (see encl 8, pp 112–114, prayers iii–xi) sought by OBT from the Federal Court.

Touching on the law, Ms Lim submitted that this court of co-ordinate jurisdiction with the trial court cannot grant the reliefs sought. What more, she said, as that judgment was affirmed by the Federal Court. Producing *Sun Life Assurance Co of Canada v Jervis* [1944] 1 All ER 469 at p 471 (where the House of Lords held that 'it is an essential quality of an appeal fit to be disposed of by the House of Lords that there exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue'), Ms Lim submitted that there was no live issue with the striking out of TAC & Sons' appeal between OBT and OBT & Sons. The Courts of Judicature Act 1964 empowers the court to dismiss or stay any proceedings where the subject is res judicata. In any event, on the doctrine of res judicata, the court has the inherent jurisdiction to strike out any proceedings. The issues now raised on the sale agreement and assignment should have been canvassed before the Federal Court. The recanvassing of the same issues is an abuse of the process of court. This court is functus officio. It cannot set aside a final judgment of another High Court. Citing *Tai Chai Yu v The Chief Registrar of the Federal Court* [1998] 2 CLJ 358, Ms Lim said 'even the Federal Court cannot review its own decision'. This court cannot expunge the consequential reliefs granted by the trial court.

Mr JA Yeoh defended this action as follows. In Suit No 449–81, there was no claim or cross-claim between OBT and OBT & Sons. The assignment was not an issue before the trial court. Whether there was an assignment or not, which rightly was the subject of fresh proceedings, should not have been addressed by the trial court when adjudicating on the sale agreement. The trial court held that the issue was between TAC & Sons and OBT & Sons. Then, there should not have been an order affecting OBT. This proceeding is to expunge that part of the judgment on the assignment and not the entire judgment. TAC & Sons commenced Suit No 449–81 against OBT for alleged breach of the sale agreement. On the basis of the assignment, OBT & Sons intervened as the second defendant. OBT & Sons contended before the trial court that there were issues between OBT and OBT & Sons. On that basis, the trial court allowed OBT & Sons to cross-examine OBT. However, before the Federal Court, OBT & Sons contended that there were no issues between OBT and OBT & Sons. OBT & Sons approbated and reprobated. 'OBT's appeal was struck off as if there was no appeal'. Since the merits of OBT's appeal were not considered, OBT could come before this court and ask if the assignment was an issue before the trial court. If the assignment was not an issue, then the judgment cannot stand. OBT & Sons admitted to the Federal Court that there was no issue on the assignment only after the time allowed for appeals had passed. Accordingly, OBT could not apply to the Federal Court for the case to be reopened by the trial court.

The basis for this action, Mr Yeoh further imparted, could be seen:

(a) in encl 3 p 203 para 7 of the affidavit in support of OBT & Sons's striking out motion, which reads:

> Notwithstanding the main question between [OBT] and [TAC & Sons] as to whether the appeal could continue between them, I am advised and verily believe that [OBT] should no longer be a party to this appeal in view of the dismissal of [TAC & Sons'] appeal against it as there is no longer any [lis] before the Federal Court to allow the appeal to be proceeded with against [OBT & Sons];

(b) in encl 3 p 225 para 4 in another affidavit in support of OBT & Sons's striking out motion, which reads:

> I crave leave first to refer to para 7 of my earlier affidavit dated 21 December 1995 and write to state that the word 'list' should read 'lis'. I reiterate that there is no longer any subsisting dispute between me and TAC & Sons on which any relief is being claimed by TAC & Sons against me. There was never any claim or cross-claim as between us in the court below on which any instant first respondent as plaintiff; and

(c) in encl 8 p 23 para 6.4 in the affidavit affirmed on 23 December 1997 in support of the instant striking out application, which reads:

> There was no cross-claim between [OBT & Sons and OBT] in the said civil suit at the High Court. However, this does not preclude the High Court judge from deciding on the validity of the assignment because there was a counterclaim for specific performance and for damages for breach of contract by OBT & Sons against TAC & Sons. The learned judge had to determine the

A issues based on the pleadings of the parties concerned and one such issue was the validity of the assignment. The matter about the assignment formed part of the pleadings. In fact, it was the basis of the intervention by OBT & Sons.

In view of the admissions in the aforesaid affidavits that there was no issue between OBT and OBT & Sons, 'this court has jurisdiction', Mr Yeoh B assured the court after having said that impeaching a judgment and appealing against a judgment are two different judicial processes, to consider this action and to impeach the judgment affected by those admissions. On his proposition that a judgment could be impeached, he directed the court's attention to *Insas Bhd & Anor v Ayer Molek Rubber Co Bhd & Ors* [1995] 2 MLJ 833 (where the Federal Court expunged certain C remarks of the court below). Then, pointing to *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 (where the Federal Court held, inter alia, that one High Court may exercise judicially its inherent jurisdiction to set aside a final judgment of another High Court where that final judgment was proved to be null and void on ground of illegality or lack of jurisdiction), Mr Yeoh contended that this court is not D functus officio on a matter that is null and void. When TAC & Sons' appeal was struck off, he said, the foundation and substratum of OBT's appeal were lost and OBT could not canvass before the Federal Court the matters now canvassed before this court, matters which strike at the very core of this proceeding. The proper forum to raise the present complaint is the High E Court and not the Federal Court by an appeal. The doctrines of functus officio and res judicata do not afflict the present complaint.

In a nutshell, Mr Yeoh contended, clearly the gravamen of his submission, that OBT & Sons eventually owned up before the Federal Court that the assignment was not an issue before the trial court, and that the findings of the trial court on the assignment as well as the consequential F orders, in the light of OBT & Sons' eventual admission that the assignment was not an issue before the trial court, should not and could not stand in its entirety.

Still, the first subject that should be addressed by this court, since the judgment of the trial court is undoubtedly the paramount factor in this G application, is the finality of a judgment.

It is fitting, not just because it is superior authority but also because the facts bear comparison, to refer first to *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd.* There, the appellants were the registered co-proprietors of a piece of Malay reservation land that was charged to the H respondent as security for an advance to a third party. Upon breach of the loan agreement, the respondent obtained an order for sale of the said land. The appellant then applied for a declaration that the charge as well as the order for sale were invalid as being in contravention of the Malay Reservations Enactment. On 21 March 1988, the High Court granted the declaration and ordered the appellant, the latter upon the respondent's I application, to repay all monies lent; there was no appeal against that order. On 8 October 1990, the High Court granted a further order declaring that the appellant had received an advantage and ordered the sale of the said land; the appeal against that order was struck out.

Now, reminiscent of the instant case, although not exactly on all fours, the appellant commenced proceedings afresh to have the order of 8 October 1990 declared null and void and to have it set aside on the ground that it contravened the Malay Reservation Enactment. The appellant argued that they were entitled to the remedy ex debito justitiae without the need to comply with the appeal procedure. The respondent argued that res judicata and estoppel precluded the appellant from questioning the validity of the order of 8 October 1990. Mohd Noor Abdullah J held that it would be unjust to estop the appellants from challenging the order of 8 October 1990 by reference to res judicata or to any other branch of the doctrine of estoppel, as the order of 8 October 1990 was plainly invalid. On appeal, the Court of Appeal held that the High Court was functus officio and had no jurisdiction whatsoever to set aside the order of 8 October 1990, regardless of any illegality in the order.

However, the Federal Court in allowing the appeal and restoring the order of Mohd Noor Abdullah J held that the High Court has the necessary inherent jurisdiction quite unaffected by the doctrine of functus officio to set aside a final judgment of another High Court that could be proved to be null and void on ground of illegality or lack of jurisdiction and that a person affected by the order is entitled to apply to have the order set aside without the need to have any recourse to the rules that deal expressly with proceedings to set aside orders for irregularity.

At p 409, Mohd Azmi FCJ, with him Eusoff Chin Chief Justice and Wan Adnan FCJ (as he then was), spelt out the special exception to the rule that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction, as follows:

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank*'s case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of irregularity or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '... which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and to give to the judge a discretion as to the order he will make.
>
> The Privy Council through Lord Diplock also emphasized that the courts in England have not closed the door as to the type of defects in the final judgment that can be brought into the category that attracts ex debito justitiae the right to have it set aside without going into the appeal procedure, 'save that specifically it includes orders that have been obtained in breach of rules of natural justice'. Similarly in this country, the statement of Abdoolcader J (as he then was) in *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37 at p 39 provides the correct guideline on the subject:

A 'The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings before any court or tribunal and whenever it is relied upon — in other words, it is subject to collateral attack. In collateral proceedings, the court may declare an act that purports to bind
B to be non-existent. In *Harkness v Bells' Asbestos and Engineering Ltd* [1967] 2 QB 729, Lord Diplock (now a Law Lord) said (at p 736) that "it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or going to the court and asking for it to be set aside".'

For my part, I must hasten to add that apart from breach of rules of natural
C justice, in any attempt to widen the door of the inherent jurisdiction and discretion of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect
D in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within
E the special exception.

Gopal Sri Ram JCA as well held that an order of a court of limited jurisdiction made without jurisdiction may be declared void and set aside, and that a court of unlimited jurisdiction, absence of an express enabling jurisdiction, has inherent power to set aside its orders made in breach of
F written law (at p 425):

If as held ... there is no power in a court to set aside its orders, though made in contravention of the express provisions of a statute, then, I must fold my arms in abject submission, allow the orders to stand and let the illegality persist. But I do not perceive the law to intend such a result.

G It is true, as a general rule, that orders of a court of unlimited jurisdiction may not be impugned on the ground that they are void in the sense that they may be ignored or disobeyed ... .

It is one thing to say that an order of a court of unlimited jurisdiction must be obeyed until it is set aside. It is quite a different thing to say that a court of unlimited jurisdiction may make orders in breach of written law. ... I
H take it to be well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the
I court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal.

Peh Swee Chin FCJ allowed the appeal on different grounds. Nevertheless, pertinent to this application, his Lordship had this to say of a final judgment (at p 417):

> When a judgment in the High Court has been perfected ... a party to the judgment ... cannot reopen the matter finalized in the judgment by seeking to alter it or amend it for the court would be functus officio by virtue of the ratio of *Hock Hua Bank v Sahari bin Murid* [1981] 1 MLJ 143. Once perfected, a judgment of the High Court is also entitled to the obedience and respect from the parties to it on the basis of a command from a superior court of unlimited civil jurisdiction in the course of contentious litigation.

In *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 where the High Court reopened its earlier procedural ruling, heard arguments afresh and reversed its earlier ruling, and where it was argued, on appeal, that it was well within the powers of the judge to alter the judgment at any time before it was entered and perfected, the Court of Appeal per Gopal Sri Ram JCA stated the circumstances under which a court may amend or alter its own order (at p 66):

> ... once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened willy-nilly. One may then ask: how is this approach to be reconciled with the decision in *Harrison*? The answer to that question lies in recognizing that the principle for which that case is authority applies only where it is demonstrated that the court plainly lacked jurisdiction to make the order complained of; provided, of course, that the order in question has not been drawn up and perfected. To extend the scope of that principle would be to effectively demolish the requirements of certainty and finality which are the two pillars on which the judicial process rests.

Unquestionably, therefore, it is the law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction (see *Hock Hua Bank Bhd v Sahari bin Murid*). Except that a person affected by an order which could be proved to be null and void on ground of irregularity or lack of jurisdiction (*Badiaddin*) is entitled to apply to have set aside ex debito justitiae without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity. The courts have not closed the door to the type of defects in the final judgment that can be brought into the category that attracts ex debito justitiae the right to have it set aside without going into the appeal procedure. The general rule is that the order must be a nullity. Apart from a breach of rules of natural justice, the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not be applied to a defect in a final order which has contravened a procedural requirement of any written law (*Badiaddin*). The discretion to invoke the inherent jurisdiction should be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice.

Otherwise, once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to so there is certainty and finality to

judgments and orders, and may only be reopened if it is demonstrated that the court plainly lacked jurisdiction to make the order complained of and provided that the order in question has not been drawn up and perfected. In all other cases, the normal appeal procedure should be adopted to set aside a defective order.

But then, in the instant case, the normal appeal procedure was adopted. And since the normal appeal procedure was adopted, it only stands to reason that the alleged defect of the judgment and related issues should have been canvassed, indeed it was incumbent upon OBT to so canvass, before the apex court who could confirm, reverse or vary the said judgment or order a retrial or remit the matter to the High Court with the opinion of the Federal Court thereon to the High Court or make such other order in the matter as to it may see just and by that order exercise any power which the High Court might have exercised (see s 92 of the Courts of Judicature Act 1964). For was it not the case, given that the Federal Court had consummate appellate powers, that every ailment afflicting the judgment, if true, could have been addressed and could have been remedied by the Federal Court. On the other hand, the High Court with only a rather limited authority to reopen a matter could only set aside the order of another High Court of concurrent jurisdiction if it could be clearly demonstrated that the court plainly lacked jurisdiction to make the order complained of. And was it not also true that the judgment was only liable to a collateral attack, assuming that the court plainly lacked jurisdiction to adjudge on the assignment, if and surely only if, the normal appeal procedure was not adopted. Since OBT adopted the appeal procedure, again assuming for the sake of argument that the court plainly lacked jurisdiction to adjudge on the assignment, and most reasonably OBT would have accepted a favourable result surely without complaint, then OBT should abide by the result. Having failed in his appeal, OBT could not fall back and launch a collateral attack against the judgment nor reagitate the same issues that ought to have been canvassed before the appellate court. Or else, there would not be an end of litigation.

Mr Yeoh argued that OBT's appeal was struck out on a technicality. This argument brings to mind the case of *Syarikat Perkhidmatan Bas Sibuga Sdn Bhd v Sykt Bas Jalan Leila Sdn Bhd* [1997] 3 CLJ 614. In that case, the sessions court struck out the action that it held was statute barred. The High Court struck out the appeal as the appeal record was not filed within the prescribed period. The plaintiff then filed a fresh but identical action. The sessions court held, on the defendant's application to strike out the fresh action, that the striking out order in the first action was a final decision and that the doctrine of res judicata precluded the fresh action. On appeal to the High Court, the plaintiff argued that the doctrine of res judicata should not be invoked as the first appeal was struck out on a technicality without a decision on the merits.

Richard Malanjum J who extensively surveyed the doctrine of res judicata before hand but would have none of the appellant's argument that the doctrine of res judicata should not be invoked because the first appeal was struck out on a technicality, had this to say (at pp 623–624):

> The proper course should have been an appeal against the first decision. That was taken by the appellants/plaintiffs but failed on a technical ground. Nevertheless, as it was due to their own conduct that the appeal was struck out, they should not be heard now to say that they could recommence another action as they disagreed with the first decision. Otherwise there is nothing to stop a third fresh action instead of appealing if they think an error of law has also been committed when deciding the instant case.

Except, in the instant case, there was no possibility of an appeal against the striking out, being by the apex court, of OBT's appeal. As Ms Lim bluntly but fairly pointed out, the judgment stands. There was a proper litis contestatio and a final adjudication between the parties to it on the merits. The judgment is one that left nothing to further dispute, is final and conclusive and not open to appeal. It is more than entitled to the obedience and respect from the parties to it. OBT cannot reopen the matter finalized in the judgment and following appeal by seeking to alter or amend it, as would be the case if the judgment, to borrow the words of Mr Yeoh, is disturbed and if parts of the judgment are expunged.

Unless, of course, if it could be clearly demonstrated that the judgment could be proved to be null and void on ground that the court plainly lacked jurisdiction to adjudge on the assignment. But then, as said, having adopted the normal appeal procedure, OBT could not launch a collateral attack against the judgment. However, for the sake of argument, assuming that OBT had not adopted the normal appeal procedure, it was not shown nor demonstrated that the judgment could be proved to be null and void on ground that the court plainly lacked jurisdiction to adjudge on the assignment.

The alleged contravention — the assignment was not an issue and the trial court could not adjudicate on the assignment — was not one which defied a substantive statutory prohibition, as was in *Badiaddin*'s case, so as to render the judgment null and void. As Richard Malanjum J observed in *Syarikat Perkhidmatan Bas Sibuga Sdn Bhd v Sykt Bas Jalan Leila Sdn Bhd*, a per incuriam decision is not a nullity per se. An aggrieved party is at liberty to appeal to a higher court, as did OBT who would not have appealed, reasonably, against the judgment nor filed this action to expunge only that part of the judgment adverse to him, if it is truly a nullity.

Moreover, contrary to OBT's assertion, the assignment was indeed a contentious issue before the trial court. The state of the pleaded case boils down to this. TAC & Sons sought to rescind the sale agreement. OBT sought to enforce the sale agreement, for himself. OBT & Sons, allegedly as successor-in-title/assignee of OBT, also sought to enforce the sale agreement for themselves. OBT pleaded that the assignment had been rescinded whilst OBT & Sons pleaded that the rescission of the assignment was bad in law. Plainly, there was a tussle in court between OBT and OBT & Sons for the one available prize — the right to perform the sale agreement and to the title and benefits thereunder. And quite obviously, the court could not just award that one available prize, be it to OBT or to OBT & Sons, without it first having adjudicated on the assignment and alleged rescission of the assignment. For there were two competing counterclaims

A and specific performance sought by OBT or OBT & Sons could not be ordered in favour of either, surely not, unless the rights of the parties inter se to or in the subject matter of the disputed rescission of the assignment were first determined. There could be no denying it, that the assignment was an issue. The pleadings said it was so, and the court could not but adjudicate on the pleaded case before it. True, there might not have been a B formal claim or counterclaim between OBT and OBT & Sons. Yet, it remained, what with two competing counterclaims, that the court could only order the specific performance that both OBT and OBT & Sons sought, in favour of OBT or OBT & Sons, if and only if the court could adjudicate on the competing counterclaims and (disputed) rescission of the C assignment. Perhaps belabouring the point, OBT pleaded that the assignment had been rescinded whilst OBT & Sons pleaded that the rescission was bad in law. Surely, and it could not have escaped OBT or OBT & Sons, particularly as OBT & Sons had intervened as the purported successor-in-title/assignee of OBT, that was clear invitation to the court, with evidence permitting, to deliberate on the assignment and purported D rescission of the assignment. Reasonably, how could it be said that the assignment was not an issue, notwithstanding that there was no claim or counterclaim between OBT and OBT & Sons? For to argue intransigently, then it could be said that the assignment was not an issue in Suit No 449–81, with respect, is only to argue the unarguable, against that which is the E incontestable.

Plainly and obviously, this action, again with respect, is a brazen attempt to reopen that which is final and binding. It amounts to an abuse of the process of the court (*Stephenson v Garnett* [1898] 1 QB 677). And plainly and obviously, assuming that there was no appeal that exhausted the F right, real or imagined, to this collateral attack, OBT could not bring himself within the special exception enunciated in *Badiaddin*'s case. There is no doubt that the principles of action or issue estoppel operate as a complete bar to the present action and prevent OBT from relitigating the issues that he is trying to bring up under the present action. The issue estoppel also prevents OBT's contradiction of the correctness of the final G judgment in Suit No 449–81 in this subsequent action (*Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189) and OBT's continued dispute of an issue 'that has already been determined either expressly or by necessary implication' (*Government of Malaysia v Dato' Chong Kok Lim* [1973] 2 MLJ 74, quoting *Satyadhyan Ghosel & Ors v Sint Deorajin Dobi & Anor* AIR 1960 SC 941). Besides, this court is truly functus H officio. Plainly and obviously, this is a proper case to strike out the action, now accordingly ordered, with costs.

Application to strike out allowed.

I Reported by Mohd Rizal Abidin